IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16526 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MOHANBHAI @ NANDI DAHYABHAI KOLI PATEL

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 16526 of 2003

MR ANIL S DAVE for Petitioner No. 1

MR KAMEN N SHUKLA for Petitioner No. 1

Ms P B Sheth, AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 06/04/2004

ORAL JUDGEMENT

The petitioner has filed this petition under

under Article 226 of the Constitution of India for appropriate writ, order or direction for quashing and setting aside an order dated 4.11.2003 passed by respondent No.1 herein under section 3(2) of the Gujarat Prevention of Anti-social Activities Act, 1985 (for short, 'the PASA Act') directing detention of the present petitioner on the grounds stated in the detention order.

2. It was alleged against the petitioner that four cases of prohibition under sections 65 and 66 of the Bombay Prohibition Act, 1949 were registered before South Proh. police station CR Nos.883/03, 1423/03, 1609/03 and 1620/03 on 6.6.03, 11.9.03, 29.9.03 and 30.9.03 and that two witnesses had given statements against the petitioner and, therefore, the petitioner was found to be a bootlegger and hence he was ordered to be detained. The petitioner has challenged the detention order on the ground that the alleged activity would not be treated to be a threat to public order or public health. It has also been contended that the names of the unnamed witnesses who had rendered their statements have not been disclosed to the petitioner and, therefore, the petitioner could not effectively represent her case. Therefore, the order of detention is illegal and deserves to be quashed and set aside. The petitioner has therefore, prayed to quash and set aside the order of detention and set him at liberty forthwith.

3. On receipt of the petition, rule was issued and in response to the service of notice of rule, Ms P B Sheth, learned AGP appears on behalf of the respondents.

4. During the course of hearing, learned Advocate for the petitioner has contended that though four offences under the Bombay Prohibition Act have been registered against the petitioner, it cannot be said that the registration of the said offences amount to a threat to public order or public health. It has also been contended that names of two witnesses who had rendered statements against the petitioner were not disclosed to the petitioner. It is true that under section 9(2) power of privilege to withhold names of the witnesses on the ground that the witnesses have fear or apprehension in their minds and, therefore, names were not required to be disclosed.

5. In this respect, we may refer to a decision of this Court (Coram: Hon'ble Mr Justice A L Dave) in Special Civil Application No.294/2000 passed on 19.4.2000 wherein it has been clearly laid down that before claiming privilege under section 9(2) of the Act, the

detaining authority must have credible material before it in order to ascertain the reasonable fear or apprehension in the mind of the witnesses whose names have not been disclosed to the detenu. It has also been observed that if there is no credible material before the detaining authority, even non-disclosure of the names of the witnesses would violate principles of natural justice and consequently, the order of detention cannot be sustained in the eye of law. As regards the registered offence, learned Advocate for the petitioner has argued that the petitioner could not be treated to be a bootlegger whose activities would lead to a threat to public order or public health. At this stage the Learned AGP has relied upon a decision of Kanuji Zala v. State of Gujarat, 2000(4) GLR 3256 in order to argue that the registration of prohibition offences would lead to a threat to public health.

6. However, the said decision came to be considered by this court in LPA No.223 in SCA No.554/2000. There the Division Bench of this Court dealt with the said decision in a judgment dated 22.8.2000. The Division Bench of this court also required to consider three decisions of the Supreme Court as under:

i. Piyush Kantilal Mehta v. Commissioner of Police, AIR 1989 SC 491.

ii. Om Praksh v. Commissioner of Police, JT 1989 (4) SC 177

iii. Rashidmiya alias Chhava Ahmedmiya Shaikh v. Police Commissioner, Ahmedabad, AIR 1989 SC 1703.

Even the decision of Kanuji Zala v. State of Gujarat, 1999 (2) GLH 415 was also considered by the Division Bench of this court in the said judgment. After considering the aforesaid three decisions of the Hon'ble Supreme Court, and the fourth one is of Kanuji Zala (supra), this court found there was no material before the detaining authority to hold that the activities of the petitioner detenu would amount to a threat to a public health or public order. The pertinent observation can be gathered from paras 4 and 5 of the said decision which may be reproduced for reference as under:

"4. In this case of K.S. Zala v. State of Gujarat (supra), the Supreme Court also considered three earlier decisions in the case of Piyush Kantilal Mehta (supra), Ompraksh (supra) and Rashidmiya (supra) and observed in para 4 that in none of the three cases relied upon by

the learned counsel, the point whether public order can be said to have been disturbed on the ground that the activity of the detenu was harmful to the public health arose for consideration and that the detaining authority has not recorded such satisfaction, moreover in these three cases the detaining authority has referred to some incidents of beating but there was no material to show that as a result thereof even tempo of public order was disturbed, whereas in the case before the Supreme Court in the case of K.S. Zala v. State of Gujarat (supra) the detaining authority has specifically stated in the grounds of detention that selling of liquor by the petitioner and its consumption by the people of that locality was harmful to their health. It was also stated that the statements of the witnesses clearly show that as a result of violence resorted to by the petitioner even tempo of public life was disturbed in those localities for some time. That material on record clearly shows that the members of public of those localities had to run away from there or to go inside their houses and close their doors.

5. If we examine the present case on the anvil of the test which has been applied by the Supreme Court in the case of K S Zala v. State of Gujarat (supra), ie. with regard to the presence of credible material and as to how the detaining authority has made the mention against the appellant being an obstruction to the public health and public order, we find that in the instant case so far as the statements of the witnesses which were recorded with regard to unregistered cases, that ground has been rejected by the learned single judge himself. It is of course true that after narrating the particulars of the criminal cases, the detaining authority has mentioned that the activities of the appellant were an obstacle to the public health and public order, but this bald observation cannot be taken to be decisive so as to arrive at the satisfaction that the activities of the petitioner were prejudicial to the public roder or public health and that tempo of public life was disturbed. No observation made in any part of the judgment can be read in isolation and bereft the context. The judgment is to be read as a whole and even the observations which have been made by the Supreme Court in para 6 of the

judgment are to be considered in light of the earlier observations made in para 5 where presence of credible material before the detaining authority has been insisted upon. Thus, litmus test to find out as to whether it is a case of breach of public order or breach of public health is concerned, credible material has to be there.

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In this view of the matter, keeping in view of the observations made by the Supreme Court in the case of K S Zala (supra) itself in paras 4 and 5, we do not find that it can be held to be a case of beach of public health and public order."

7. If we consider the facts and circumstances of the said case and compare them with the facts and circumstances of the present case, it will be found that there is no material difference between the two and, therefore, the ratio laid down by this court in the aforesaid decision rendered by the Division Bench which is required to be followed by this court since the said decision has again been rendered after due consideration of the case of Kanuji Zala (supra). When the decision of Kanuji Zala (supra) has been interpreted in a particular manner by the Division Bench of this court, this court is required to follow the interpretation of the case of Kanuji Zala (supra) by the Division Bench of this court.

8. Therefore, while following the said decision of the Division Bench, it has to be accepted that even in the present case, the detaining authority did not have adequate credible material with it in order to find that the alleged activities of the detenu amounted to a threat to public order or public health. So on the one hand so far as the registered offences are concerned, the activities of the petitioner could not be treated to be a threat to public order or public health. So far as the unregistered cases are concerned, names of the witnesses were not disclosed to the petitioner and for claiming privilege under section 9(2) of the act, it is found that the detaining authority did not have credible material with it as no enquiry was undertaken in order to ascertain that there was reasonable apprehension of fear in the minds of the witnesses. In absence of such material before it, the detaining authority would not have passed the detention order and at least continuance of the detention of the petitioner cannot be sustained. Therefore, the roder of detention is required to be set aside and quashed. This can be done by allowing this petition.

9. For the foregoing reasons, this petition is allowed. The impugned order of detention dated 4.11.2003 passed by respondent no.1 herein be quashed and set aside. The detenu is ordered to be set at liberty forthwith, if no longer required in any other case. Rule is made absolute to the aforesaid extent. No order as to costs. D.S. permitted.

[D P Buch, J.]

msp